

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN MALCOLM TARPLEY,

Defendant-Appellant.

UNPUBLISHED

March 5, 1999

No. 201942

Oakland Circuit Court

LC No. 92-117200 FC

Before: Sawyer, P.J., and Bandstra and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals by leave granted an order denying his motion for relief from judgment and an evidentiary hearing brought under MCR 6.500 *et seq.* We affirm.

In September of 1992, defendant pleaded guilty to two counts of armed robbery, MCL 750.529; MSA 28.797, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and habitual offender-second, MCL 769.10; MSA 28.1082. The sentencing guidelines recommended a minimum sentence range of five to twenty-five years for the armed robbery convictions. A sentencing panel recommended a sentence of eighteen to forty years. On September 18, 1992, the court sentenced defendant to two concurrent terms of two years for the felony-firearm convictions, to be followed by concurrent terms of eighteen to forty years for the armed robbery convictions. Defendant was ordered to pay restitution in the amount of \$3,116. Defendant appealed to this Court, which affirmed his convictions.

In January of 1996, defendant filed a motion for relief from judgment in the trial court pursuant to MCR 6.500 *et seq.* He argued that he had been denied the effective assistance of trial and appellate counsel, that his plea was involuntary because it had been induced by inaccurate legal advice, that his conviction for two counts of armed robbery and felony-firearm violated the prohibition against double jeopardy because there was no factual basis for a second count of armed robbery, that he did not receive all the jail credit to which he was entitled, and that because the amount of restitution was disputed, a hearing should have been held, and that furthermore, the court should have considered his ability to pay. Defendant also contended that the complainant should be permitted to testify concerning the loss.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In response to the motion, the trial court ordered plaintiff to provide an accounting of the amount lost from the robbery and what, if any, had been paid or recovered. The court ordered plaintiff to provide documentation regarding the amount of jail credit to which defendant was entitled. The court ordered plaintiff to respond to defendant's assertions that an insufficient factual basis existed for the second conviction of armed robbery. Plaintiff provided an answer as ordered.

In an order entered June 11, 1996, the trial court granted the motion for relief from judgment in part and denied it in part. The court found the defendant was entitled to 128 days of jail credit. The court reduced the amount of restitution to \$1,120. The Court found that a sufficient factual basis existed for the second count of armed robbery. The court stated that a sufficient factual basis existed if inculpatory inferences could be drawn from an accused's admissions, even if exculpatory inference could also be drawn, citing *Guilty Plea Cases*, 395 Mich 96; 235 NW2d 132 (1975). However, the court found no basis for defendant's assertion that trial and appellate counsel rendered ineffective assistance.

Defendant filed a motion for rehearing. He requested a *Ginther*¹ hearing on the issue of whether his plea was improperly induced by counsel's promise of a minimum sentence of five years, and whether counsel rendered ineffective assistance by failing to move to quash the second count of armed robbery. The trial court initially granted a hearing, but later determined that a hearing was unnecessary. On December 18, 1996, the court entered an order comporting with its decision.

On appeal, defendant argues that the trial court erred by denying his motion for an evidentiary hearing on the issue of whether trial counsel rendered ineffective assistance in connection with the plea. We disagree.

Defendant sought relief from judgment under MCR 6.500 et seq., which establishes the procedures the trial court must follow in deciding if a defendant is entitled to post-appeal relief. The defendant is first required to file his motion, explaining each of the grounds in support of the motion. MCR 6.502(A) and (C). MCR 6.502(E) specifically allows a defendant to attach any affidavits or documentary evidence to the motion that supports the relief requested. Under MCR 6.508, the court has two procedural options in deciding the motion: (1) it may rule on the motion based on the motion, response and record, MCR 6.508(B), or (2) it may order an evidentiary hearing if it determines that one is required, MCR 6.508(C).

Therefore, MCR 6.508(B) permitted the court to rule on the merits of defendant's motion without holding an evidentiary hearing. Here, the court decided that an evidentiary hearing was not required and based its decision on the motion, response and record as it was permitted to do under that rule. Given that defendant failed to attach with his motion any affidavits from witnesses to support his claim that trial counsel was ineffective, we believe that the court was completely within his authority to decide that an evidentiary hearing was unnecessary.

Moreover, we do not believe that the court erred in denying the motion to the extent that it was based on a claim that the plea was induced by promises of leniency. In order to obtain relief under the provisions of MCR 6.500 et seq, the defendant must show good cause for failing

to raise an issue that could have been raised on appeal and actual prejudice from the alleged error. MCR 6.508(D)(3)(a) and (b). In the case of a conviction following a plea of guilty, actual prejudice means that the defect in the proceedings was such that allowing the plea to stand would result in manifest injustice. MCR 6.508(D)(3)(b)(ii).

Here, defendant contended that he had good cause for not raising the issue on appeal because his appellate counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298; 521 NW2d 797; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel is presumed to have afforded effective assistance. A defendant can overcome that presumption by showing counsel's failure to perform an essential duty, resulting in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987). Appellant counsel does not necessarily render ineffective assistance by failing to raise every conceivable issue on appeal. Appellate counsel is afforded some discretion in selecting which issues appear most promising to pursue on appeal. *People v Reed*, 198 Mich App 639, 646-647; 499 NW2d 441, aff'd 449 Mich 375 (1995).

In this case, defendant was not entitled to relief because there is nothing in the record to show that defendant advised appellate counsel of the issue. There is simply nothing to indicate that defendant told appellate counsel that trial counsel promised him a minimum sentence of five years. Therefore, defendant failed to show that appellate counsel was ineffective. Accordingly, defendant failed to show good cause and he was not entitled to relief under MCR 6.500 *et seq.*

Moreover, we do not believe that defendant has shown actual prejudice, as that term is defined in MCR 6.508(D)(3)(b)(ii). The record does not show that defendant's plea was an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand.

At the time that defendant entered his plea, he signed a written plea form in which he acknowledged that the most time he could receive was life in prison and that there was no plea bargain in this case. Defendant denied that he had been promised anything or threatened to plead guilty, and acknowledged that it was his own choice to plead guilty. On the record at the plea proceeding, defendant affirmed for the court that there was no plea bargain nor any promises of leniency from the prosecutor to get him to enter the plea. He denied that anyone promised him anything or threatened him in order to get him to plead guilty. He affirmed that it was his own choice to plead guilty. Defendant twice affirmed for the court that he understood that his convictions could result in life imprisonment.

Moreover, at the sentencing hearing in September of 1992, neither defendant nor his mother expressed surprise when the court imposed a sentence of eighteen to forty years' imprisonment. The court even stated on the record at sentencing that the guidelines were five to twenty-five years, but that there was recommendation that defendant receive a sentence of eighteen to forty years. Based on the foregoing, there is nothing in the trial court record to support defendant's claim that he entered his plea under the belief that he was only facing a minimum term of five years. It seems incredible that defendant would wait over three years after his sentencing hearing to raise this issue if he truly did enter his plea under the belief that he had

a prearranged sentence for a term of five to twenty-five years. Defendant even filed his own application for leave to appeal to the Michigan Supreme Court and he did not raise this issue in his application. The delay in raising this issue simply does not lend credibility to defendant's claims. Accordingly, we conclude that defendant failed to show actual prejudice and therefore he was not entitled to relief under MCR 6.500 *et seq.*

In sum, because defendant failed to show good cause and actual prejudice as required under MCR 6.508(D), the court did not err in refusing to grant relief under MCR 6.500 *et seq.*

Next, defendant argues that relief is warranted because an insufficient factual basis existed for his pleas to two counts of armed robbery and two counts of felony-firearm. Defendant emphasizes that testimony at the plea hearing established that he took money from only one person, the store operator. No money or property was taken from Lisa Ott, the other person present.

This issue is without merit. This issue was not but could have been raised in defendant's appeal of right, and therefore defendant was required to show actual prejudice because of the alleged irregularity. MCR 6.508(D)(3)(b). Here, there was no actual prejudice because a sufficient factual basis existed for the convictions. A factual basis to support a guilty plea exists if the court can draw an inculpatory inference from what the defendant admitted. *People v Jones*, 190 Mich App 509, 511; 476 NW2d 646 (1991). This is true even if an exculpatory inference could also be drawn and the defendant contends that the latter is the correct inference. *Id.* at 511-512. A plea may still be accepted if the defendant denies an element of the crime, so long as an inculpatory inference can be drawn from what the defendant has admitted. *Id.* at 512.

In this case, while defendant made some contradictory statements at the plea hearing, his admissions were sufficient to support accepting his plea to two counts of armed robbery. From defendant's admissions, the court could infer that defendant committed an armed robbery against both persons present since defendant intended to rob the store and pointed the gun at both persons who at least appeared to have access to the money he wanted. Accordingly, the court did not err in concluding that defendant was not entitled to relief under MCR 6.500 *et seq.* on this basis.

Next, defendant contends that the court erred in not ordering a hearing on the question of restitution owed by defendant. We disagree.

As noted above, the court had the authority, under MCR 6.508(B) to make a decision without holding an evidentiary hearing. Here, the court properly reviewed the motion, the prosecutor's response and record in determining that the amount of restitution should be reduced to \$1120. As defendant submitted nothing suggesting that either all of the money was recovered or that he was unable to pay restitution at some point, the court could properly determine that an evidentiary hearing was unnecessary.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).